

1-1901-8278-2
MN OSH Division Docket No. 3994
OSHI ID No. H0363 069-92

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

John B. Lennes, Jr., Commissioner
Department of Labor and Industry,
State of Minnesota,

Complainant,

v.

Energyx Corporation/WINCO, Inc.,

Respondent.

ORDER GRANTING
MOTION FOR SUMMARY AFFIRMANCE

A Motion for summary affirmance has been served upon Respondent, Energyx Corporation/WINCO, inc., by Complainant on September 20, 1993. Respondent replied to the Motion by letter filed on September 27, 1993. The record on this Motion closed with the receipt of the Respondent's letter.

Julie A. Leppink, Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155-4199, submitted the Complainant's Motion. Donald L. Schemmel, Vice President, Energyx Corporation/WINCO, Inc., 225 Cordova Avenue, Le Center, Minnesota 56057, submitted Respondent's Letter.

Based on the record herein, the Administrative Law Judge makes the following:

ORDER

1. The Complainant's Motion for summary affirmance is GRANTED.
2. The Citation and Notification of Penalty, dated September 22, 1992, is affirmed.

3. The Respondent, Energyx Corporation/WINCO, inc. shall forthwith pay to the Commissioner of Labor and Industry the sum of \$756.

Dated: October _____, 1993.

GEORGE A. BECK
Administrative Law Judge

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 182.664, subd. 5, the decision of the Administrative Law Judge may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, or their

authorized representatives with 30 days following the publication of this Order. The procedures for appeal are set out in Minn. Rules Chapter 5215.

MEMORANDUM

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985). The evidence must be viewed in a light most favorable to the non-moving party. *Sauter*, 70 N.W.2d at 353. The party defending the motion must present "specific facts showing there is a genuine issue for trial." Minn.R.Civ.Proc. 56.05; see also, *Rademacher v. FMC Corp.*, 431 N.W.2d 879, 881 (Minn. App. 1988). Summary disposition is the administrative equivalent of summary judgment. Minn. Rule 1400.5500(K).

Complainant asserts that a Verson 60 ton mechanical press brake, a Pacific 150 hydraulic assisted press brake, and a Pacific 149 hydraulic assisted press brake were being operated by Respondent's employees at its workplace. None of these machines is equipped with guarding or a restricted operating mechanism to ensure that injuries arising from the operation of these press brakes are prevented. Complainant alleges that this activity violates 29 C.F.R. § 1910.212(a)(3)(ii) which requires guarding or some other mechanism to prevent the operator from having any part of his body in the "danger zone" when the machine is operated. Among the machines mentioned as falling under this standard are "power presses." 29 C.F.R. § 1910.212(a)(5)(iv)(d).

Respondent argues that 29 C.F.R. § 1910.212(a)(3) is not the proper standard to apply in this case. Respondent asserts that 29 C.F.R. § 1910.217(a)(5) exempts hydraulic assist press brakes and mechanical press brakes from guarding standards. T

Finally, and most importantly, we believe that this construction embodies a reasonable assessment of the intended nature of § 1910.212 . . . as a general "catch-all" or "gap-filler" intended to impose a point of operation guarding requirement in any case where a exists and guarding is feasible but no other regulation addresses the problem.

The Court of Appeals considered the claim that the specific standard of § 1910.217(a)(5) exempts press brakes from the general standards of § 1910.212(a)(3). In Diebold, the Court of Appeals adopted the approach of the Secretary, characterized as:

§ 1910.217 is "specifically applicable" only to a class of machines composed of all mechanical power presses except press brakes, so that there is no standard "specifically applicable" to press brakes and the general requirements of § 1910.212 can properly be applied.

Diebold, Inc. v. Marshall, 585 F.2d at 1334.

The exclusion in § 1910.217 for press brakes only applies to the standards set in that section. Since the citation for failing to provide guarding at the point of operation is a standard under § 1910.212, it is not superceded where no other standard exists. The standard cited by Complainant is applicable to Respondent's power presses. Two cases subsequent to Diebold have expressly applied § 1910.212(a)(3) to press brakes. A.R.A. Manufacturing, 1981 OSHD § 25,144 (OSHRC Nos. 79-6223 and 79-6368, 1981); Secretary v. Tube-Lok Products, 1981 (OSHD § 25,235 (Docket No. 16200, 1981).

Respondent asserts that chance of injury is small due to the slow power stroke of the press brakes and the absence of any routine in the parts produced with these machines. That issue was addressed in Tub-Lok, supra, which concluded that the low probability of injury does not excuse failure to provide protection against inadvertent injury.

Respondent did not cite the cost of guarding as a reason for non-compliance with § 1910.212(a)(3). Nonetheless, Complainant cited Mercury Metal Products, 1983-84 OSHD (CCH) § 26,692 (1983), which holds that economic infeasibility for guarding must be affirmatively shown by the employer. No such showing has been made in this case.

The press brakes subject to this citation have been operated for sixteen years by Respondent. At no time before the Citation in this matter did the Complainant's inspectors point out any problems with the lack of guarding at the press brakes' points of operation. Respondent asserts that it has relied upon the inspectors "to point out safety matters we may have overlooked and give advice on corrective actions." Schemmel Letter (9/24/93), at 2. The first decision applying § 1910.212(a)(3) to press brakes was handed down in 1978. Complainant's failure to issue a prior citation or point out non-compliance does not preclude citing this violation.

Respondent has not presented a factual issue for trial. Complainant has demonstrated that guarding was not supplied to the point of operation of three press brakes in violation of 29 C.F.R. § 1910.212(a)(3). Accordingly, the Complainant is entitled to summary disposition in its favor and the Citation against Respondent imposing a penalty of \$756 is AFFIRMED.

G.A.B.

TDD: 612/341-

7346

October 12, 1993

John B. Lennes, Jr., Commissioner
MN Department of Labor and Industry
443 Lafayette Road
St. Paul, MN 55155

Donald L. Schemmel, Vice President
Energyx Corporation/WINCO, Inc.
225 Cordova Avenue
Le Center, Minnesota 56057

Julie A. Leppink
Assistant Attorney General
520 Lafayette Road, Suite 200
St. Paul, Minnesota 55155-4199

RE: John B. Lennes, Jr., Commissioner, Department of Labor and Industry,

Dear Parties:

Enclosed and served upon you by mail is the Administrative Law Judge's Order Granting Motion for Summary Affirmance in the above-entitled matter.

Also enclosed to Commissioner Lennes is the official record.

Sincerely,

GEORGE A. BECK
Administrative Law Judge

Telephone: 612/341-7601

GAB:llc

Enclosure

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

AFFIDAVIT OF SERVICE BY U.S. MAIL

Laurie L. Clos, being first duly sworn, hereby deposes and says that on the 12th day of October, 1993, at the City of Minneapolis, county and state aforementioned, she served the attached Order_Granteeing_Motion_for_Summary Affirmance;_OAH_Docket_No._1-1901-8278-2 by depositing in the United States mail at said City of Minneapolis, a true and correct copy thereof, properly enveloped, with first class postage prepaid, and addressed to the individuals named herein:

John B. Lennes, Jr., Commissioner
MN Department of Labor and Industry
443 Lafayette Road
St. Paul, MN 55155

Donald L. Schemmel, Vice President
Energyx Corporation/WINCO, Inc.
225 Cordova Avenue
Le Center, Minnesota 56057

Julie A. Leppink
Assistant Attorney General
520 Lafayette Road, Suite 200
St. Paul, Minnesota 55155-4199

Laurie L. Clos

Subscribed and sworn to before me
this 12th day of October, 1993.

Notary Public